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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LAWSON REIMER, Defendant and Appellant.	C083665 (Super. Ct. No. CRF163733)

Defendant Michael Lawson Reimer was found guilty by jury of inflicting corporal injury on a spouse, and he separately pled no contest to counts of unlawfully possessing a gun and ammunition. On appeal, he contends the trial court erred in five respects: (1) in refusing to instruct the jury on mutual combat; (2) in permitting the prosecutor to impeach him with two prior convictions; (3) in admitting a 911 call under the spontaneous statement exception; (4) in declining to strike his prior strike; and (5) in failing to stay punishment under Penal Code section 654 for the possessing ammunition

count.[1] Defendant's last contention has merit. We will stay execution of punishment on Count 3 and otherwise affirm.

I. BACKGROUND

Defendant was charged with inflicting corporal injury on a spouse (§ 273.5, subd. (a)—Count 1), possessing a firearm as a felon (§ 29800, subd. (a)(1)—Count 2), and possessing ammunition while prohibited from owning or possessing a firearm (§ 30305, subd. (a)—Count 3). He was also alleged to have suffered a prior serious felony. (§ 667, subds. (c), (e)(1).)

Before trial, defendant pled no contest to possessing a firearm and possessing ammunition. The gun and ammunition had been found in a cabinet under the sink in defendant's home. They were found by officers responding to the domestic violence call that gave rise to the corporal injury charge.[2]

A. The Victim Testifies

At trial, the victim was called to testify by the prosecution. She testified she had been married to defendant for 11 years and they were still married.

On July 4, 2016, she had a disagreement with defendant and left the house. When she returned that night, defendant was already in bed. She told defendant she was home and went to lie down next to him. They started arguing again and he asked her to sleep downstairs.

At one point, the victim went to a plastic drawer to get her things. Defendant got mad and started pulling the drawer apart. The victim initially testified that when

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[1] Undesignated statutory references are to the Penal Code.

[2] The facts for the possession counts are taken from the preliminary hearing transcript, which the parties stipulated to as the factual basis.

defendant pulled the drawer apart, he hit her lip, possibly with his elbow, and her lip started bleeding.

Defendant then pushed her backwards, scrapping the victim's elbow. When the victim pushed back, she broke several nails. Defendant pushed her again. She tried to hang on and scratched defendant with her long nails (he was not wearing a shirt).

The victim went downstairs and outside. A neighbor saw her lip and called 911.

The prosecutor asked the victim about her prior testimony at the preliminary hearing, where she had testified defendant had hit her in the mouth with a closed fist. The victim answered that she was "not sure" if her lip injury was from being hit or from defendant pulling the drawer apart.[3]

The jury was then played a recording of the 911 call placed after the incident. The call was placed by the neighbor and continued by the victim who told the dispatcher, "My husband, he . . . hit me . . . ." After the audio was played, the victim testified she had never heard the recording before, and it was "like putting a nail in [defendant's] coffin." She also reiterated that as to her lip, either defendant or the plastic drawer had hit her.

B. Defendant Testifies

Defendant testified that the night of the incident, he and the victim were arguing. He said the victim, "would get very aggressive and like very defensive." At one point, she left without saying where she was going and came back after dark, when he was in bed.

They argued again and he asked her to sleep downstairs. She turned on a light, started collecting her things, and unplugged a fan. They went back and forth turning on-and-off the light and plugging-in and unplugging the fan.

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[3] She also testified that during the preliminary hearing her brain was "really foggy" because she was on "all kinds of medications."

At one point, when defendant got out of bed to turn the fan back on, the victim got mad and aggressively approached him with her "chest poked out." She bumped him with her chest with such force that he had to put his feet wide to catch himself. He described the victim as having her hands out and hissing with her teeth bared. When he reached for the fan, she scratched him on his neck. She then chest bumped him again and returned to an "aggressive stance."

At some point, the victim pulled the fan plug and they started fighting over the plug. In the process, they both fell backwards: Defendant fell on the bed and the victim fell into a nearby lattice divider. She then went downstairs.

Defendant grabbed the plastic drawer and said, "if you're—you're going to leave, take your stuff with you." The victim came back upstairs, grabbed the drawer, and they pulled it back and forth until things went everywhere. The victim's lip injury occurred when the plastic drawer came apart.

The victim then went outside. When defendant went outside about five minutes later, he saw a police officer.

On cross-examination, defendant denied acting aggressively or ever touching the victim. When asked: "So it's your testimony that … all of this happened in self-defense?" he responded, "Yes."

C. Jury Verdict and Sentencing

The jury found defendant guilty of inflicting corporal injury on a spouse. (§ 273.5, subd. (a).) The trial court found he had suffered a prior strike.

After declining to strike defendant's prior strike, the trial court imposed a four-year term for corporal injury (the low term, doubled for the strike) along with a one-year four-month term for possessing the gun (one third the middle term, doubled for the strike). As to the possessing ammunition count, the trial court reduced the offense to a misdemeanor and imposed a concurrent 180-day term.

II. DISCUSSION

A. Mutual Combat Instruction

On appeal, defendant first challenges the trial court's refusal to instruct the jury on mutual combat (CALCRIM No. 3471). In relevant part, the instruction provides: "A person who (engages in mutual combat/ [or who] starts a fight) has a right to self-defense only if: [¶] 1. (He/She) actually and in good faith tried to stop fighting; [¶] [AND] [¶] 2. (He/She) indicated, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wanted to stop fighting and that (he/she) had stopped fighting(;/.) [¶] . . . [¶] [AND [¶] 3. (He/She) gave (his/her) opponent a chance to stop fighting.] [¶] If the defendant meets these requirements, (he/she) then had a right to self-defense if the opponent continued to fight." (CALCRIM No. 3471.)

1. Background

Before closing arguments, defense counsel asked the trial court to instruct the jury on the right to self-defense (CALCRIM No. 3470), as well as mutual combat (CALCRIM No. 3471). The court expressed skepticism: "I don't think self-defense applies . . . because he's not saying he caused an injury in self-defense. He says I didn't cause the injuries, or I don't know how the injuries occurred."

Defense counsel replied, "there was some mutual pushing between the two where she was the primary aggressor, and so I think they would be entitled to know that he doesn't have to retreat, that he's allowed to flex his chest back at her, that he can continue doing what he's doing . . . ."

The trial court denied the requested self-defense instruction as to the corporal injury count, but granted it as to the lesser included charge of battery: "In my view the . . . only evidence where self-defense could possibly occur is where their chests met. There's no evidence that that conduct caused any injury or caused a traumatic condition, but I do believe it would be relevant to the lesser charge of a battery."

As to mutual combat, the court denied the instruction as to both charges. It explained, "while there were facts that support that the chest-butt could be construed in self-defense, it didn't seem like there was evidence to support that there was mutual combat with the types of description that is encompassed under [CALCRIM No.] 3471." It added, "I don't think there's really evidence that they engaged in mutual combat."

The jury was thereafter instructed with CALCRIM No. 3470, right to self-defense, as to the lesser included charge of battery of a spouse.

2. Analysis

On appeal, defendant argues the mutual combat instruction was warranted because the facts demonstrated he and the victim entered into a voluntary fight, indicating mutual combat. He avers that had the jury received CALCRIM No. 3471, it might have led to reasonable doubt about his level of culpability.

The People respond that mutual combat is not a stand-alone defense: It exists alongside the standard self-defense instruction. Indeed, the bench notes direct that CALCRIM No. 3470 be given along with CALCRIM No. 3471. The People note that defendant does not challenge the trial court's finding that substantial evidence did not support a self-defense instruction as to the corporal injury charge, and therefore defendant cannot separately challenge the failure to instruct on mutual combat.

Defendant responds that a mutual combat instruction can be given independently of a self-defense instruction. He argues, "conceptually, two combatants can surely have agreed on a mutual combat with no self-defense on either side involved."[4] The People are correct.

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[4] Defendant cites *People v. Ross* (2007) 155 Cal.App.4th 1033, arguing it suggests a self-defense instruction and a mutual combat instruction can be independent. There, the court of appeal held a mutual combat instruction was erroneously given where the defendant had punched the victim after the victim slapped his face. (*Id*. at pp. 1036, 1038-1039.) The appellate court reasoned that evidence was lacking that both combatants actually consented or intended to fight before the claimed occasion for self-

The language of CALCRIM No. 3471 makes clear mutual combat is not an independent defense. Rather the instruction limits the circumstances under which a defendant may claim self-defense: "A person who []engages in mutual combat . . . has a right to self-defense only if . . . ." (CALCRIM No. 3471.) Merely engaging in mutual combat, without more, does not effect a defense to corporal injury. And, as the People note, defendant does not challenge the trial court's finding that he did not act in self-defense vis-à-vis the corporal injury charge. Indeed, while defendant answered "[y]es," when asked if he had acted in self-defense, there was no actual evidence of him using force to defend against imminent danger. Accordingly, the trial court properly denied the request as to the corporal injury count.

Defendant also contends the trial court erred in refusing the instruction as to the lesser included count of battery. Assuming arguendo this is so, it would be harmless under any standard. The jury was properly instructed on corporal injury and returned a guilty verdict. Thus, it had no cause to consider lesser included counts. Accordingly, any instruction error on the lesser included count could have no effect on the ultimate outcome.

B. Admitting Defendant's Convictions for Impeachment

Defendant next contends the trial court abused its discretion and violated his due process rights in admitting two prior convictions for impeachment purposes: a 2005 conviction for attempted burglary and the 2016 conviction for firearm possession, which he pled to before trial. He argues their probative value on his credibility was substantially outweighed by the risk of undue prejudice under Evidence Code section 352. We disagree.

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defense arose. (*Id.* at p. 1054.) Defendant, here, fails to elucidate how *Ross* can be read to support an independent mutual combat instruction.

1. Background

Before trial, the prosecution moved to admit, under Evidence Code sections 1101 and 1109, evidence of defendant's 2007 convictions for resisting arrest and false imprisonment. It also sought to impeach defendant (should he testify) with evidence of three convictions from 2004, 2005, and 2008. The trial court denied the motion as to all the convictions except a 2005 attempted burglary conviction.[5]

When defendant later testified, he admitted a 2005 felony conviction for attempted first-degree burglary. When his counsel asked, "And has it been expunged from your record?" he replied, "Correct." The prosecutor objected on relevance grounds. The trial court sustained the objection and struck the response.

After defense counsel completed direct examination of defendant, the court addressed whether the prosecutor could impeach defendant with the gun and ammunition possession convictions. The trial court allowed impeachment with the 2016 firearm possession, but it did not permit the prosecutor to refer to the day or month of the offense.

2. Analysis

On appeal, defendant—while conceding both were crimes of moral turpitude—argues admitting the priors was an abuse of discretion under Evidence Code section 352. He reasons the attempted burglary conviction was over 10 years old and was committed when he was 21. Further, the burglary's objective could have been a crime not entailing dishonesty, such as assault. As to the 2016 firearm conviction, he argues because it took place in the same year as the charged offense, the jury might have concluded the offenses were related. He also argues the gun was in his home, not to be used, but only "in case of dire home defense." Thus, it was not indicative of his credibility. We are not persuaded.

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[5] Defense counsel's written motion conceded the 2005 attempted burglary conviction was a crime of moral turpitude and asked that, if he testified, the inquiry be limited to the fact that he had a 2005 felony.

We review an Evidence Code section 352 analysis for abuse of discretion. (*People v. Moore* (2016) 6 Cal.App.5th 73, 91.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' " (*People v. Thomas* (2011) 52 Cal.4th 336, 354-355.)

Here, the trial court acted within its discretion in admitting the priors. As defendant concedes, they were crimes of moral turpitude. And while the 2005 conviction was over 10 years old (11 years at the time of trial), that does not automatically render its admission an abuse of discretion. (See *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 ["convictions remote in time are not automatically inadmissible for impeachment purposes"].) Indeed, "[e]ven a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior." (*Id*. at pp. 925-926.) Since his 2005 conviction (which was not his first offense), defendant accrued convictions in 2008 for resisting arrest and false imprisonment and in 2016 for the firearm and ammunition possession.

Nor does the possibility the burglary's objective was something other than theft render the trial court's ruling unreasonable. Defendant neither challenged its admissibility on that ground nor provided facts to support the challenge. Rather, he conceded it was a crime of moral turpitude and asked only that the inquiry be limited. (Cf. *People v. Maxey* (1985) 172 Cal.App.3d 661, 668 ["A defendant may not stand silently by or acquiesce in a finding that his prior burglary was theft related and then raise a *Keating* [(*People v. Keating* (1981) 118 Cal.App.3d 172)] issue on appeal"].)

As to the 2016 gun possession prior, defendant fails to persuade us that the jury might surmise the offenses were related because they were told they occurred in the same year. Further, even if the gun was kept only "in case of dire home defense," it still

reflected a willingness to flout the law. As such it was relevant to defendant's credibility, and the trial court acted well within its discretion in admitting it.[6]

As to his priors, defendant raises a final contention that the trial court erred in sustaining the prosecutor's objection to evidence that his 2005 conviction was dismissed pursuant to section 1203.4, subdivision (a). He argues the dismissal was relevant to his credibility, and the trial court should have permitted evidence of it in order to mitigate the consequences of admitting the prior. We disagree.

It is well settled that a defendant may be impeached with a prior felony conviction even if he has obtained a dismissal under section 1203.4. (*People v. O'Brand* (1949) 92 Cal.App.2d 752, 756; *People v. James* (1940) 40 Cal.App.2d 740, 747.) Further, here, the dismissal of the conviction was not mitigating evidence. Under section 1203.4, if a petitioner establishes the necessary factual predicates (fulfilling probation conditions for the term of probation or being discharged prior to the termination of probation), the trial court is required to grant the requested relief. (*People v. Tran* (2015) 242 Cal.App.4th 877, 892, fn. 6.) Accordingly, here the dismissal was only indicative of defendant completing probation. Thus, the trial court acted within its discretion in sustaining the objection.

C. Admitting the Recording and Transcript of the 911 Call

Defendant next contends the trial court abused its discretion in admitting the recording and transcript of the 911 call. He argues it was inadmissible hearsay and did not fall within the ambit of the spontaneous statement exception. We disagree.

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[6] Defendant also contends he was denied due process, reasoning that because the trial court abused its discretion in admitting the priors, he was denied a right to a fundamentally fair trial afforded by due process. Having concluded admitting the evidence was proper, we reject this claim as well.

1. Background

The 911 call was played during the victim's testimony. The call had been placed by a neighbor, but the victim soon joined the call. The following excerpts are pertinent to defendant's challenge on appeal:

"Dispatch: What's your name?

"[Victim]: My husband, he [unintelligible] hit me [unintelligible]

"Dispatch: He hit you?

"[Victim]: [unintelligible] myself but I didn't, I tried to defend myself.

"Dispatch: Ok, take a breath for me so I can understand you, ok? I just want to clarify. Your husband hit you?

"[Victim]: Yes he did—

"Dispatch: When did this happen?

"[Victim]: —hit me.

"Dispatch: When did this happened?

"[Victim]: A few minutes ago. Just a few minutes ago.

"[¶] . . . [¶]

"Dispatch: Where is he now?

"[Victim]: He's in the apartment. His name is Michael Reimer. R-E-I-M-E-R.

"Dispatch: Ok, and what is Michael's date of birth?

"[Victim]: [Provides defendant's date of birth]. He's throwing my stuff all around the room too.

"[¶] . . . [¶]

"Dispatch: . . . Do you need any medical attention?

"[Victim]: I don't think so, I just [unintelligible] pushed me down the freaking stairs [unintelligible]. He keeps slapping me . . .

"Dispatch: Ok, did all this happen today?

"[Victim]: Yes, just a few minutes ago!

"[¶] . . . [¶]

"Dispatch: Alright, ok, what happened today that caused all of this?

"[Victim]: He's been fighting and arguing with me all frickin' night and then all morning he's been calling me all kinds of names, all out my name, calling me a bitch, a fucking cunt, all kinds of stuff, it's been going on for like a week. And I can't do anything ever. I don't do anything. I go to school, I come home, and I [unintelligible]. I do the housework, I do everything! [7]

"Dispatch: Ok, alright. Take a breath for me, ok?

"[¶] . . . [¶]

"Dispatch: How tall is he?

"[Victim]: Um, 5'9".

"Dispatch: 5'9"? Is he a slim, medium, or heavy-set build?

"[Victim]: Medium now.

"Dispatch: Alright, what was he wearing today?

"[Victim]: Um, last time I seen him he was in boxers . . . .

"[¶] . . . [¶]

"Dispatch: "Alright, what color were his boxers?

"[Victim]: "His boxers are gray or black or something—I don't remember.

"Dispatch: "Alright, Ok, [victim]. And you're sure you don't need any medical attention?

"[Victim]: I don't know. My lip is busted or something. Hey, is my lip busted?

"Unknown: Yea.

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7 Defendant raises a challenge to this paragraph, arguing references to day-and-night arguments and week-long name calling were not part of the incident and thus were not properly admitted as an excited utterance. But having failed to raise this specific objection before the trial court, it is forfeited on appeal. (See Evid. Code, § 353; *People v. Brady* (2010) 50 Cal.4th 547, 576 [failure to object to portions of courtroom testimony that were prejudicially inflammatory forfeited the issue on appeal].)

"[Victim]: He hit me.

"[¶] . . . [¶]

"Dispatch: Is there anything other than your lip, [victim]? Anywhere else that you're injured?

"[Victim]: My elbow, my [unintelligible], um, I think that's it. My stomach hurts a little. I think that's it.

"Dispatch: Your stomach hurts a little?

"[Victim]: Yes.

"Dispatch: Ok. Is that just 'cause of the situation or did he—?

"[Victim]: It's 'cause of the situation."

After the 911 call was played, and outside the jury's presence, the parties noted for the record that defense counsel had objected to playing the 911 call, noting she understood it would be played to impeach the victim's testimony only if she denied making the call or denied the events described in the call. The trial court responded that it had ruled the call admissible.

The prosecutor noted the call was an excited utterance and self-authenticating. Further, the call slightly impeached the victim and helped refresh her memory, and thus was admissible under several hearsay exceptions. Defense counsel questioned whether a foundation had been laid for the excited utterance exception.

2. Analysis

A hearsay statement is admissible if it "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) In determining whether a statement was made while the declarant was under the stress and excitement of the event, and before there was time to contrive and misrepresent, the court may consider factors including: "[1] the passage of time between the startling event and the statement, [2] whether the declarant blurted

out the statement or made it in response to questioning, [3] the declarant's emotional state and physical condition at the time of making the statement, and [4] whether the content of the statement suggested an opportunity for reflection and fabrication." (*People v. Merriman* (2014) 60 Cal.4th 1, 64.) No one factor is dispositive, however. (*Ibid*.)

On appeal, we uphold the trial court's factual findings where supported by substantial evidence, and we review for abuse of discretion the decision to admit the statement under the spontaneous statement exception. (*People v. Merriman, supra*, 60 Cal.4th at p. 65.)

Here, the call was properly admitted as a spontaneous statement. The call was made just after incident: "[d]id this all happen today?" "Yes, just a few minutes ago!" The victim blurted out descriptions of the event: "What's your name?" "My husband, he . . . hit me." The victim's emotional and physical state suggested stress of excitement. Her tone in the recording, which is part of the record, evinces excitement, and several times the dispatcher tried to calm her: "Ok, take a breath for me so I can understand you." The victim also reported her stomach hurt "[be]cause of the situation." Finally, the context does not suggest an opportunity for reflection as the victim did not call 911 herself, but was given the phone by a neighbor.

Defendant, undeterred, maintains the victim's statements showed she had engaged in a deliberative or reflective process. He reasons that because she did not place the call herself, she was therefore "not feeling stressed enough to place a call to 911." Further, she was able to answer routine questions such as her address and phone number, defendant's whereabouts, his date of birth, age, height, build, and what he was wearing. Defendant argues, "[s]urely, having the capacity to discuss the color of [defendant's] boxer shorts indicates that [the victim] was engaging in a reflective process at the time." We cannot agree.

That the victim did not place the call herself could also indicate her excitement was such that she lacked the wherewithal to call 911. Indeed, her statements and tone in

the recording did not suggests she was "not feeling stressed enough" to call 911. Further, that she could recall defendant's date of birth and other details is not surprising given their marriage's duration. Similarly, her ability to described defendant's boxers as "gray or black or something," does not alter our conclusion that she was still under the stress of the event.

Accordingly, admitting the 911 call was not an abuse of discretion.[8]

D. Defendant's Prior Strike

Defendant next contends the failure to strike his prior strike was irrational and arbitrary. He argues the nature and circumstances of his present felony and prior serious felony placed him outside the spirit of the Three Strikes Law. He notes the strike occurred in 2005, during a period following his grandmother's death, who had practically raised him due to his mother's drug addiction, and his current offense was not particularly egregious. Further, he had been attending college for three years before his arrest and was working toward a degree in social services. He also notes the trial court failed to acknowledge the *Williams* factors (*People v. Williams* (1998) 17 Cal.4th 148) in its analysis, and challenges the trial court's conclusion that he lied during his testimony. We find no error.

1. Background

At sentencing, the trial court denied defendant's request to strike his prior strike pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The trial court noted it may look to various factors, including the injuries in the present case, which the court concluded were on the "more moderate level." It noted defendant's strike was over 10 years old, and defendant had other felony convictions. The court also noted: "In order to be convicted of the domestic violence charge, the jury had to conclude that

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[8] The People argue the call was also admissible as a prior inconsistent statement. Having concluded the call was properly admitted as a spontaneous statement, we need not address that argument.

[defendant] lied when he testified, and I believe that conclusion was reasonable by them, and so I too conclude that he lied under oath when he testified, and to me, even considering the favorable factors, that's enough in my mind to deny him the discretion of the Court to not strike the strike."

2. Analysis

The three strikes sentencing scheme applies where the defendant has at least one qualifying strike, unless the trial court concludes an exception should be made. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) A trial court properly exercises its discretion in striking a strike only if it finds "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects," the defendant falls outside the law's spirit and should be treated as though he had not committed the prior strike. (*People v. Williams, supra,* 17 Cal.4th at p. 161.)

When a trial court declines to strike a strike, we review the decision for abuse of discretion. (*People v. Carmony, supra,* 33 Cal.4th at pp. 374-375.) We will not reverse "unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) Where the court, aware of its discretion, " 'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the . . . ruling, even if we might have ruled differently . . . .' " (*Id.* at p. 378.)

Here, denying the *Romero* motion was not so irrational or arbitrary that no reasonable person could agree with it. Defendant had not remained law abiding following his strike. His current offense was violent in nature. And it was not irrational for the trial court to consider the likelihood he lied under oath as indicative of his character and prospects. Further, any contention that the trial court failed to sufficiently articulate the *Williams* factors is forfeited for failure to object. (Cf. *People v. Scott* (1994) 9 Cal.4th 331, 353 ["the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices.

Included in this category are cases in which [the court] . . . failed to state any reasons or give a sufficient number of valid reasons"].)

E. Section 654

Finally, as to Count 3, defendant contends the trial court erred in failing to stay the sentence under section 654. The People concede error, and we agree.

Though a person may be convicted of more than one crime for the same act, section 654 proscribes multiple punishments for the same act. (§§ 654, 954; *People v. Correa* (2012) 54 Cal.4th 331, 337.) An "act" can include a course of conduct. (*Id.* at p. 335.)

Here, we agree with the parties that there is nothing in the record to indicate the ammunition and gun were kept as part of separate courses of conduct. (See *People v. Lopez* (2004) 119 Cal.App.4th 132, 138 ["While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them. Where, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment"].) As such, Counts 2 and 3 arose from the same act or course of conduct. We will therefore modify the sentence to stay imposition of sentence on Count 3 under section 654.

III. DISPOSITION

The judgment is modified to stay imposition of sentence on Count 3, possession of ammunition by a person prohibited from owning or possessing a firearm. (§ 30305, subd. (a).) As modified the judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

ROBIE, Acting P. J.

/S/

HOCH, J.